

**ATTORNEY GENERAL CHRIS KOSTER
TALKING POINTS: AS PREPARED FOR DELIVERY
Missouri Chamber Day at the Capitol
February 15, 2012**

Good afternoon.

The Second Injury Fund has been on life-support for three years now. As Attorney General, I have a fiduciary duty to keep the patient alive as long as possible, and I have. But there comes a time when every physician must tell his patient's family a difficult truth: the end is near. I'm here today to share that truth with you.

The Second Injury Fund, or SIF as we sometimes call it, is almost 70-years-old. Created to protect employers from the rare but high costs of their employees' sudden, long-term disabilities, the Fund has helped thousands of previously injured workers to find new...gainful...employment.

The SIF is funded by a surcharge on all workers' compensation and self-insurance policies. Prior to 2005, that

surcharge, paid by Missouri businesses, used to be adjusted up or down depending on the fund's annual expenditures. That's how responsible insurance companies work: actuarial adjustments are made on a regular basis so a plan's premiums cover the cost of the insurance promised, plus a little more.

By 2005, the SIF had \$25 million in reserve. The surcharge was 3.5% that year and netted another \$9 million surplus. But rather than allowing the Department of Labor and Industrial Relations to make the appropriate actuarial adjustments to equalize the SIF's costs and coverage, the General Assembly voted that spring to permanently cap the surcharge at 3%. The legislative vehicle for that change was called Senate Bill 1.

It's worth recalling that the fiscal note attached to SB 1 predicted at the time that the 3% cap would lead to the Fund's insolvency. The fiscal note was widely available and was known to both the General Assembly and the business community prior to the bill's final vote.

Since the passage of the bill, two actuarial studies have confirmed that the 3% surcharge does not support the coverage provided by the Second Injury Fund. One study, commissioned by the Blunt administration, was produced by the accounting firm of Coopers and Lybrand. The other study was put forth by state auditor Susan Montee. Both studies have been available to the members of the legislature and the business community for more than five years, yet paralysis in addressing this issue persists.

By 2008, the SIF's annual expenditures had increased to \$74 million while its revenue dropped to \$56 million, forcing the Fund to consume more than two thirds of its built up reserves. As the housing market collapsed and unemployment increased, revenue fell even further. In 2011, the SIF collected only \$43 million even as its obligations increased to \$77 million. This year is likely to be even worse.

As Attorney General, my only recourse to preserve the dwindling Fund has been to triage the claims against it. When I

first took office, I lowered settlement authority for meritorious claims from \$60,000 to \$40,000, but the Fund's balance still fell to less than \$4 million by the end of 2009. At that point, we had to stop all settlement negotiations, and we required every claimant to prove his case in court no matter how meritorious the claim. That delayed the inevitable, but the decision has caused an accrual of interest on the Fund's debt – your debt – at a statutory rate of 9%.

I have also laid-off approximately 1/3 of the staff and attorneys that defend the fund.

When the General Assembly failed...in the 2010 and 2011 legislative sessions...to either breathe new life into the Fund or to wind it down, the SIF could no longer cover all its debts. As a result, my office stopped paying new permanent total disability awards altogether in March 2011 so that the Fund could build up enough revenue to pay its ongoing, pre-existing obligations.

As of the first of this month, February 2012, the Second Injury Fund has unpaid bills of more than \$14 million that have piled up against it since last May. This \$14 million in unpaid bills represents the cost of judgments to 184 claimants who have received permanent total disability awards in just the last 10 months. Add to that total...nine months of biweekly payments owed to those same recipients, and you have approximately \$14 **and a half** million dollars in past due debts which are currently accruing interest at 9%.

The failure to resolve this situation is literally costing you \$1.3 million a year in interest on just the last 10 months of unpaid bills alone. In human terms, 184 Missourians -- unable to work because of their disabilities -- have never received *any* of the benefits guaranteed them by the General Assembly and the business community, and adjudicated by Missouri's courts. And none of these numbers contemplate the more than 29,000 new claims filed against the fund that have yet to be litigated, and whose expenses have yet to be realized. 29,000 cases.

Let's pause for a moment on these 29,000 new cases. Assuming that half of the cases result in outright dismissals, which is likely a best case scenario, the fund faces 14,500 current, meritorious claims. And assuming that each of these claims is valued at just \$10,000, which is also a conservative estimate, the Second Injury Fund faces, at minimum, \$145,000,000 dollars in unrealized, current liabilities. Add to that \$15,000,000 in unpaid bills brings you to \$160 million dollars in unrealized, current liabilities on a fund that has \$9 million dollars in the bank.

So again, in a nutshell, the fund takes in \$43 million dollars a year in revenue, has \$77 million dollars a year in expenses, has \$160 million dollars in unrealized liabilities, and has 9 million dollars in the bank.

The Plaintiffs' bar has begun to seek writs of mandamus directly against the State Treasurer, and we have exhausted nearly all our legal options to stop them. Under these conditions, there's a genuine probability that the SIF won't even have the money to pay for the attorneys to defend the Fund, ultimately leading to a flood of frivolous default

judgments that will exponentially increase SIF liabilities. Once the run on the bank begins, there will be no mechanism to stop it and no amount of lawyering or legislative self-denial will be able to save the SIF from complete collapse.

At this juncture, I see three paths ahead of us. The first is to do nothing and let the Fund continue to rack up debt. We know how well that strategy has worked out for the federal government over the last decade. This is the most chaotic and, in my opinion, the most irresponsible path the General Assembly can take. It continues the financial downward spiral for employers, leaves injured claimants unpaid, and creates a huge mess for the courts to sort out in ways no one can even begin to predict. Unfortunately, that's exactly where we're headed once again this session if no legislative leader has the courage to guide us out of this desert.

The second path is to phase out the fund permanently. All things being equal, I would choose this option. The General Assembly has proven that government should not be in the

insurance business. The legislature has made basic pricing decisions regarding the SIF that no responsible businessperson would make, these decisions have bankrupted the Fund in just a few short years, and yet, faced directly with the clarity of this error, the legislature has been completely unable to correct its course.

I believe that insurance premiums should be priced by actuaries in the private sector, and not by politicians. I have a distant recollection that this was once an article of faith within Missouri's governing majority.

Unfortunately, the winding down of the Fund is unlikely in the current political climate. Of course, this is because pricing Second Injury Fund risk in the worker's comp market would require businesses to pay market rates...and to pay their bills on time. The General Assembly hasn't placed such requirements on Second Injury Fund businesses in almost seven years. Therefore, conventional wisdom is that the third and only remaining path is to recapitalize the Fund.

If we choose that path, premiums should be set in the Second Injury Fund world just as they are in the business world: premiums should cover expenses and allow for small and consistent reserves. The Fund's surcharge should be based on actuarial evidence and mathematical fact. The surcharge should not be decided by a three-fourths vote...of four elected officials, as is currently proposed.

Relying on political leaders to set the insurance premiums is exactly the road that brought us to the current crisis. I've heard it said that the rationale for the proposed 4-person commission is so a few politicians will have "skin in the game." But you understand, I hope, that if Jay Nixon, Chris Koster, Tom Dempsey and Tim Jones decide by some unforeseeable turn of events not to raise the surcharge on Missouri businesses, it doesn't make your liabilities disappear. Any more than SB1 has made your liabilities disappear. The laws of accounting won't be suspended simply because the Governor, the Pro Tem, the

Speaker and the Attorney General say so. No. Your liabilities will simply accrue interest at 9% until you pay them.

The only rational solution is to actuarially determine the proper surcharge, and then adjust it year-by-year, up or down, according to the fund's coverage and expenses. Recapitalizing the Fund demands a long-term commitment and a willingness to face the economic realities around us.

Recognizing that this goal may not – and perhaps should not – be met all in one year, the General Assembly should exercise its policy-making discretion, and legislate a reasonable period of time during which the Fund will be brought back to solvency. Once this policy decision is complete, the politicians should back away and allow competent experts to make the actuarial adjustments necessary to meet the General Assembly's goal.

Keep in mind, however, that we cannot base our expectations regarding future expenditures on the Fund's past

expenses over the last three years. The actions I have been forced to take to avoid default have kept SIF's expenses artificially low since 2009.

I applaud the efforts by those promoting legislation to grapple with the Fund's future, particularly Senators Tom Dempsey and Jack Goodman and Representatives Dave Schatz and Barney Fischer. I'm encouraged that the House bill has received a hearing, and that the Senate seems willing to address SIF in a stand-alone bill. But so far, these are small steps on a grand staircase, with many left to climb.

Our economy, in both the public and private sectors, runs on credit, and credit depends on trust. Credit comes from the Latin word "credo," which means "I believe." If our workforce does not believe we will keep our promises...honor our contracts... then what have we become?

I believe it's time to resolve this crisis. The SIF cannot endure another year of inaction, and the longer we wait the

more expensive your solution becomes. I urge you to consider the various proposals before the General Assembly, either to phase out the SIF or to restore its full faith and credit. We must do one or the other, because doing nothing is a breach of the promises we have made to our employees, the people of Missouri, and to ourselves.